

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>NADIA SALAMA</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>MACY'S</b>	)	
Respondent	)	Docket No. 1,047,361
	)	
AND	)	
	)	
<b>MACY'S RETAIL HOLDINGS, INC.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent requests review of the July 12, 2010 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

**ISSUES**

The ALJ granted claimant's request for medical treatment with Dr. Craig Satterlee as well as temporary total disability benefits. Although the Order does not contain any explicit finding, it is implicit in this Order that the ALJ concluded claimant met with personal injury arising out of and in the course of her employment with respondent. Indeed, that is the very issue posed by respondent's Application for Review.

Respondent maintains the ALJ erred in granting benefits inasmuch as claimant failed to establish that her present need for treatment to her shoulder arose out of the events of July 11, 2009. Rather, respondent contends that claimant told a co-worker she fell at home, the evening after the events during her normal working shift on July 11, 2009,<sup>1</sup> and that was when she injured her shoulder. Thus, respondent urges the Board to reverse the ALJ's Order, denying claimant any of the benefits she seeks.

---

<sup>1</sup> Although this is quite clearly respondent's argument, its brief to the Board states that "[c]laimant's injury occurred because of a subsequent fall at *work*." Respondent's Brief at 4 (filed Sept. 1, 2010).

Claimant argues that the ALJ's Order should be affirmed in all respects. Claimant testified that on July 11, 2009, while working for respondent, she was suffering from the excessive heat within the store and fainted, landing on and injuring her shoulder. Accordingly, claimant maintains her present need for treatment arose out of and in the course of her employment.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

There is no dispute that claimant was working her normal shift on July 11, 2009 in respondent's jewelry department. It is likewise uncontroverted that the day was hot and claimant was overly dressed at the beginning of her shift. Her supervisors sent her home to change and return to work, which she did. Although there is some suggestion in this record that claimant was not acting normally earlier in the day<sup>2</sup>, claimant denies this. She contends the weather outside was hot, in the 90's to 100 degrees, her station was close to the exterior door, and while the air conditioner normally made the store cool, on this day it did not. And as a result, her normal work clothes were making her uncomfortable.

After she returned to work from changing her clothes, claimant's co-worker<sup>3</sup> says she appeared confused and had difficulty performing her normal duties. Then, claimant unexpectedly fainted and fell to the floor, landing on her right shoulder, which had been the subject of an earlier surgery.

Emergency personnel were called and claimant's supervisor responded. According to claimant, her supervisor made her remain on the floor, physically pushing her down. This evidence is uncontroverted. Claimant was taken to the hospital and the records reveal no obvious injury. But these same records show that claimant was less than articulate and may well be a poor historian. For example, although the medical records list a number of medications claimant recites that she is taking, at the preliminary hearing claimant denied taking most of these medications. And although claimant is adamant that she injured her shoulder in the fall, the emergency room records do not reflect this injury or complaint.

Claimant was released to return home. But when she arrived, she was unable to get in her home. She sought help from a neighbor, who was related to another physician at the hospital where claimant had been treated. This neighbor apparently believed her

---

<sup>2</sup> This suggestion comes through a co-workers statement which was admitted into evidence. But claimant's counsel had no opportunity to cross-examine that individual, nor challenge some of her factual assertions.

<sup>3</sup> Again, this is the co-worker who did not testify but provided a written statement.

to be confused and called the hospital.<sup>4</sup> According to claimant, the neighbor suggested that claimant should return to the hospital.

The record next shows that 4 hours after returning home and talking to her neighbor, on July 12, 2009, claimant (not the neighbor) called 911. She was transported to the hospital. There is no indication in these records that claimant fell in her home. The EMS record indicates that claimant was unable to verbalize any complaints. Rather, “pt. states that she ‘sat down on the floor’ tonight and felt like ‘I was going to die’.”<sup>5</sup> They questioned her further and claimant denied any “chest pain, breathing difficulty, feelings of dizziness, and pain to anybody [sic] system”.<sup>6</sup>

Claimant was transported back to the hospital, where she was x-rayed and her arm was immobilized. Her right humerus was found to be “bent” suggesting a new fracture over the previous repair and fixation.<sup>7</sup> She was also apparently given medications to address what was identified as chronic atrial fibrillation as well as Lasix to address her lower extremity edema, both of which apparently preexisted this event. After a short hospitalization, claimant was released.

Respondent does not deny that claimant fainted and fell to the floor on July 11, 2009, but merely that she did not injure her shoulder in that event. Moreover, respondent argues that claimant had been suffering from a personal condition for the balance of the day, as evidenced by the statement of Cynthia Peplow, the co-worker, and that this personal condition explains claimant’s unusual behavior and her subsequent fall and resulting injury, after she was released from the hospital. In support of this contention, respondent points to Ms. Peplow’s statement where she indicated that when she visited claimant at the hospital on July 12, 2009, claimant told her she fell *at home* after she was released from the hospital and injured her shoulder.

The ALJ granted claimant’s request for benefits undoubtedly concluding that claimant did, in fact, sustain her shoulder injury in an accident arising out of and in the course of her employment with respondent.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>8</sup>

---

<sup>4</sup> P.H. Trans. at 34.

<sup>5</sup> *Id.*, Resp. Ex. 2 at 1 (Prehospital Care Report -- July 12, 2009).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*, Resp. Ex. 3 at 1 (Dr. Martin Zink, III's July 13, 2009 report).

<sup>8</sup> K.S.A. 2009 Supp. 44-501(a).

Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>9</sup>

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.<sup>10</sup>

Here, respondent contends that neither element has been met. First, that claimant's right shoulder complaints did not arise "in the course of" her employment as she was injured sometime after she left work. Similarly, her injury did not arise "out of" her employment as she was suffering from a personal condition that led to her fall and that the fall did not cause her present need for treatment to her right shoulder.

After considering the entire record, this Board Member finds that by the barest of margins, that claimant has established she sustained an accidental injury arising out of and in the course of her employment with respondent. The medical records do not corroborate claimant's assertion that she injured her shoulder in the fall while at work on July 11, 2009, nor do they support respondent's contention that claimant fell *at home* and injured her shoulder the day after her fainting spell at work. Both of the medical records from the July 11, 2009 event in respondent's store and the subsequent emergency call on July 12, 2009 paint a picture of an elderly woman oriented to time and place but who is struggling to accurately and effectively communicate her point. This is played out again at the preliminary hearing. Claimant has difficulty expressing her point and remaining focused upon the issue at hand.

And while it appears she is not entirely accurate when it comes to explaining her prior medical history, it is uncontroverted that she was working in respondent's store on a summer day that was very hot. The store was normally cool but on this day, was not. It is undisputed that claimant was sent home to change her work outfit and when she

---

<sup>9</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

<sup>10</sup> *Id.*

returned, she experienced a fainting episode. She landed on her right shoulder, a shoulder which had been surgically repaired in 2007 and contained a metal rod which is now bent. It is also uncontroverted that she was not allowed to get up from the floor when she regained consciousness and in her words, was pushed to remain on the floor until emergency medical personnel could respond.

While at the hospital it seems the physician was more concerned about the syncope episode but it is not outside the realm of reason, based on this record, that claimant did not articulate a problem with her shoulder. She was ultimately released, returned home, appeared confused and eventually called 911 again. The first responders found claimant sitting on the floor, again not complaining of any shoulder problems. After she arrived at the hospital, somehow that complaint was voiced as an x-ray was ordered and revealed that the metal rod in her arm was now bent.

Although respondent argues that claimant was suffering from a personal condition, there is no expert testimony that establishes that fact. There is indication in this record that claimant has been suffering from atrial fibrillation since before this accident. But no one in this record testified that it was more likely than not that her atrial fibrillation caused the fall. Claimant testified that she was overheated and that led to her fainting spell. Absent any other credible explanation, this Board Member concurs with the ALJ's analysis that this was a compensable event, arising out of claimant's employment.

Similarly, this Board Member concurs with the ALJ's implicit conclusion that claimant's accidental injury occurred in the course of her employment, rather than on July 12, 2009, as respondent contends. Ms. Peplow's statement regarding claimant's purported admission that she injured herself in a fall in her home is controverted by claimant's own testimony and is not corroborated by any other testimony or evidence within the file.

For these reasons, the ALJ's Order is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.<sup>11</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Steven J. Howard dated July 12, 2010, is affirmed.

---

<sup>11</sup> K.S.A. 44-534a.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of September 2010.

---

JULIE A.N. SAMPLE  
BOARD MEMBER

c: Kathleen A. McNamara, Attorney for Claimant  
Peter J. Chung, Attorney for Respondent and its Insurance Carrier  
Steven J. Howard, Administrative Law Judge